

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JERRY W. MEYER

Claimant

VS.

PITTSBURG STATE UNIVERSITY

Respondent

Self-Insured

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Docket No. 268,028

ORDER

Claimant requested review of the March 24, 2004 Award entered by Special Administrative Law Judge (SALJ) Vincent L. Bogart. The Appeals Board (Board) heard oral argument on October 5, 2004.

APPEARANCES

Carlton W. Kennard, of Pittsburg, Kansas, appeared for the claimant. William L. Phalen of Pittsburg, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The SALJ found claimant sustained a compensable accident while in respondent's employ on April 9, 2001, thereby injuring his left elbow and back. The SALJ awarded claimant permanent partial disability compensation based upon the functional impairment rating of Dr. Kevin Komes, two (2) percent to the left upper extremity and five (5) percent to the back for a combined six (6) percent whole body disability.

In his Application for Review, claimant lists nature and extent of disability as the only issue before the Board.¹ During oral argument to the Board, claimant argued that Dr. Edward Prostic's 23 percent rating should be adopted.

Conversely, respondent argues that in light of the claimant's prior settlement with the City of Independence, Missouri, based upon an impairment rating of 22 percent to the lower back, the respondent should be given credit for the pre-existing injury, and that any award in the present action should be limited to the new two (2) percent impairment of the left upper extremity as ascertained by the treating physician, Dr. Komes.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the stipulations of the parties, and having considered the brief and oral arguments, the Board finds that the SALJ's Award should be affirmed.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.²

And functional impairment is defined by K.S.A. 44-510e, as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Also, K.S.A. 44-510d(a)(23) provides:

Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

¹ Application for Review (filed April 9, 2004).

² K.S.A. 44-501(c).

Consequently, by definition the Act requires that preexisting functional impairment be established by competent medical evidence and ratable under the appropriate edition of the *AMA Guides*, if the condition is addressed by those *Guides*.³

The Act neither requires that the functional impairment be actually rated before the subsequent work-related accident nor that the worker had been given work restrictions for the preexisting condition. Instead, the Act only requires that the preexisting condition must have actually constituted a ratable functional impairment.⁴

Claimant suffered a low back injury in Independence, Missouri in 1976. However, that condition was asymptomatic before the April 9, 2001 accident. Claimant said he received an original rating of 25 percent but settled for a 22 percent impairment rating. There is no indication that these ratings followed any edition of the *AMA Guides*. It should also be noted that there were no medical records nor any rating opinion from any physician introduced regarding claimant's previous impairment.

Kevin Komes, M.D., gave claimant a functional impairment rating of two (2) percent to the left upper extremity and five (5) percent to the back for a combined six (6) percent whole body disability. He noted that it was due to claimant's work injury at Pittsburg State University. Dr. Komes was not provided any medical records concerning claimant's preexisting condition. Accordingly, Dr. Komes did not attribute any portion of his six (6) percent combined whole body rating to a preexisting condition. In this instance the SALJ found Dr. Komes' opinion to be most credible and awarded claimant a six (6) percent functional impairment rating to the body as a whole. The SALJ did not reduce the award for any preexisting impairment under K.S.A. 44-501(c) because Dr. Komes did not rate the preexisting condition and attributed all of his impairment rating to the new injury. The Board agrees with this result. Respondent failed to prove the extent of claimant's preexisting functional impairment, if any.⁵

Award

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge Vincent L. Bogart dated March 24, 2004, is affirmed.

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

⁴ See *Watson v. Spiegel, Inc.*, No. 85,108 (Kansas Court of Appeals unpublished opinion filed June 2, 2001); *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion filed June 9, 2001).

⁵ See *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

IT IS SO ORDERED.

Dated this ____ day of November 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Carlton W. Kennard, Attorney for Claimant
William L. Phalen, Attorney for Respondent
Vincent L. Bogart, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director